

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHEKITA HILL,)
)
 Petitioner,)
)
 vs.) Case No. 12-0886
)
 GOGA BAP CORPORATION, d/b/a)
 SUBWAY STORE NO. 13268,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 24, 2012, in Lakeland, Florida before Thomas P. Crapps, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jerry Girley, Esquire
The Girley Law Firm, P.A.
125 East Marks Street
Orlando, Florida 32803

For Respondent: Matthew D. Westerman, Esquire
Blalock Walters, P.A.
802 11th Street, West
Bradenton, Florida 34205

STATEMENT OF THE ISSUES

Whether Petitioner established that Respondent is an "employer" under the Florida Civil Rights Act (FCRA), section 760.02(7), Florida Statutes (2011),^{1/} in order to confer

jurisdiction on the Florida Commission on Human Relations (Commission); and

Whether Petitioner established by a preponderance of the evidence that Respondent retaliated against Petitioner for filing a complaint with the federal Equal Employment Opportunity Commission (EEOC), in violation of the FCRA, section 760.10(7).

PRELIMINARY STATEMENT

On November 2, 2011, Petitioner, Shekita Hill (Ms. Hill), filed with the Commission a complaint alleging that Subway retaliated against her based on her filing a discrimination complaint with EEOC on January 31, 2011. Specifically, Ms. Hill alleged that Subway retaliated against her by cutting her work hours. Further, Ms. Hill alleged that as a result of the lost income, she had to apply for government assistance, and that Subway provided false information that disqualified her from receiving government assistance.

On February 28, 2012, the Commission issued a determination that no reasonable cause existed to support the retaliation claim. On March 12, 2012, Ms. Hill filed a Petition for Relief with the Commission claiming that she was "retaliated against because I filed an EEOC complaint against my employer." Specifically, Ms. Hill alleged that Subway retaliated against her by "reducing her work hours and unfairly reducing her authority

and falsely writing her up." The Commission transmitted the Petition for Relief to DOAH for a formal hearing.

At the final hearing, Ms. Hill testified in her own behalf and called Satish Patel (Mr. Patel). Ms. Hill did not introduce any exhibits into evidence. Goga Bap Corporation (Goga Bap) called Mr. Patel and introduced into evidence Exhibits numbered 1, 2, and 11.^{2/} A one-volume Transcript was filed with DOAH on November 19, 2012. The parties submitted proposed recommended orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Ms. Hill is an African-American female who began working at a Subway restaurant located in Winter Haven, Florida, as a sandwich artist in 2005. By 2007, Ms. Hill had been promoted to an assistant manager, and charged with opening the restaurant. Ms. Hill's responsibilities for opening the restaurant required her to be at work by 8:30 a.m. in order to start baking the bread for the day's sandwiches and preparing the sandwich toppings, so that the restaurant could open by 10:00 a.m. As the assistant manager, Ms. Hill earned \$9.25 an hour.

2. Goga Bap purchased the Subway restaurant where Ms. Hill worked, located in Winter Haven, Florida, in February 2009. Following Goga Bap's purchase, Mr. Patel hired his family members as managers and employees in the restaurant. At the time of the

purchase, Mr. Patel hired Ms. Hill as a sandwich artist at \$9.00 an hour. Although she was no longer an assistant manager, Ms. Hill kept her duties of opening the restaurant.

3. Goga Bap owns only one Subway restaurant franchise, and during the relevant time period, Mr. Patel was Goga Bap's sole shareholder. Mr. Patel and his wife own another Subway restaurant, located in Auburndale, Florida, through a separate legal entity, Om Shakti Corporation. This second Subway franchise is operated independently of the Subway franchise owned and operated by Goga Bap. Further, Mr. Patel owns a minority interest in two Subway franchises in Jacksonville, Florida. The record shows that the franchises in Winter Haven, Auburndale, and Jacksonville are separate corporate entities, with separate employees, separate managers, separate business accounts, and separate tax identification numbers. Each Subway franchise employs less than 15 employees. Moreover, even if one considered the restaurants in which Mr. Patel owns a majority interest, the combined number of employees is less than 15. At most, the two restaurants combined for 13 employees in any given week during 2010 and 2011. The Subway franchises in Jacksonville, Florida, in which Mr. Patel owns a minority interest, each hired six to seven employees.

4. The payroll records show that Goga Bap never employed 15 or more employees in any week in either 2010 or 2011.

5. As noted earlier, Ms. Hill's workday was scheduled to begin at 8:30 a.m. in order to open the restaurant by 10:00 a.m. From October 2010 through January 2011, Ms. Hill's attendance and punctuality began to deteriorate; thus, creating a difficulty in opening the restaurant on time. For example, on the dates October 11 through 13, 2010, Ms. Hill was scheduled to work, but called in sick. Consequently, Mr. Patel had to find someone at the last minute to open the store for those dates. In addition to the October dates, the record showed that Ms. Hill did not come to work on time for her scheduled work day of December 15, 2010, and failed to work full days on January 4 and 5, 2011. The result was that Mr. Patel found Ms. Hill an unreliable employee.

6. Because of Ms. Hill's attendance and punctuality problems, Mr. Patel decided to hire an additional employee to work the weekdays with Ms. Hill. The hiring of this additional person cut into the restaurant's profitability. Consequently, beginning in the first work week of January 2011, Ms. Hill's work hours were reduced to offset the increased costs associated with hiring an additional employee. During the first week of January 2011, Ms. Hill's hours were reduced to approximately 17 hours a week. It is noted that for the weeks beginning January 26, 2011, through February 15, 2011, the payroll records show that Ms. Hill worked between 23.53 hours to 28.09 hours a week. However, beginning the

week of February 23, 2011, Ms. Hill's work hours returned to the level of approximately 17 hours a week.

7. Mr. Patel credibly testified that Ms. Hill did not tell him that she believed that she was being discriminated against by the reduction of her work hours. Further, Mr. Patel credibly testified that he did not receive any information from Subway's corporate office that Ms. Hill had contacted Subway that she believed that Mr. Patel was discriminating against her.

8. Mr. Patel credibly testified that prior to reducing Ms. Hill's hours in early January 2011, he had not received Ms. Hill's EEOC complaint. In fact, the record shows that Ms. Hill's work hours had been reduced before she filed the EEOC complaint on January 31, 2011. Thus, she failed to show that the reduction of her work hours was a result of retaliation.

9. Ms. Hill did not bring forward any evidence showing that Goga Bap falsely provided information on any government forms.

10. There was no credible evidence showing that the decision to reduce Ms. Hill's work hours was tied or had any nexus to Ms. Hill's EEOC complaint filed on January 31, 2011.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties and subject matter pursuant to sections 120.569 and 120.57, Florida Statutes (2012).

12. The threshold question presented in this case is whether Goga Bap is an "employer," as it is defined by section 760.02(7). The term "employer" is defined by the statute as follows:

"Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person. § 760.02(7), Fla. Stat.

13. The facts showed that Goga Bap did not have more than 15 employees in the 20 or more calendar weeks for the Subway franchise where Ms. Hill worked. Moreover, even if one considered the Subway franchises in which Mr. Patel owns a controlling interest as a "single employer," the facts still show fewer than 15 employees. Ms. Hill did not bring forward any evidence showing Mr. Patel's minority ownership interest in Subway franchises in Jacksonville, Florida, should be considered as a "single employer" for meeting this jurisdictional threshold of 15 employees. See Lyes v. Cty of Riviera Beach, 166 F.3d 1332, 1340-1342, n.5 (11th Cir. Fla. 1999) (discussing the circumstances "in which it is appropriate to aggregate multiple entities for the purposes of counting employees."). Thus, Ms. Hill has failed to bring forward evidence showing that jurisdiction exists under the FCRA.

14. Assuming arguendo that Ms. Hill met the threshold jurisdictional requirement, she failed to show by preponderance of the evidence that she suffered retaliation in the work place.

15. The anti-retaliatory provisions of the FCRA, section 760.10(7), provides:

It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

16. In order to show a prima facie case of retaliation, a plaintiff must show that: (1) he or she engaged in statutorily protected expression; (2) he or she suffered an adverse employment action; and (3) there is some causal relation between the two events. Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. Fla. 1998). The federal courts have held that the causal link requirement under Title VII must be construed broadly; "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Olmsted, 141 F.3d at 1460 (quoting E.E.O.C. v. Reichhold Chem., Inc., 988 F.2d 1564, 1571-72 (11th Cir.1993)). Once the prima facie case is established, the employer must proffer a legitimate, non-retaliatory reason for the adverse employment action. The plaintiff bears the ultimate burden of

proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct. Olmsted, 141 F.3d at 1460.

17. Turning to the facts here, Ms. Hill failed to show that Goga Bap took retaliatory action against her. First, it is clear that Ms. Hill engaged in a protected action with the filing of the EEOC complaint. See City of W. Palm Beach v. McCray, 91 So. 3d 165, 172 (Fla. 4th DCA 2012); and Miami-Dade Cnty. v. Eghbal, 54 So. 3d 525, 527 (Fla. 3d DCA), review denied 71 So. 3d 117 (Fla. 2011). Second, the facts show that the reduction of Ms. Hill's work hours altered her compensation and conditions of employment; thus, she proved an adverse employment action. See Van Voorhis v. Hillsborough Cnty Bd. of Cnty Comm'rs, 512 F.3d 1296, 1300 (11th Cir. 2008) (defining an adverse employment action as "an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee."). The record, however, does not support a causal link between the filing of the EEOC complaint and the reduction of Ms. Hill's work hours. As shown earlier, Goga Bap began reducing Ms. Hill's work hours before she filed the EEOC complaint. Moreover, Mr. Patel credibly testified that he did not know that Ms. Hill had filed an EEOC complaint before her work

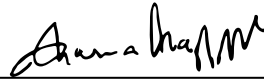
hours were reduced. Therefore, Ms. Hill failed to show that there is causal nexus between the filing of her EEOC complaint and the adverse employment action.

18. Again, assuming *arguendo* that Ms. Hill met her initial burden of proving a *prima facie* case of retaliation, Ms. Hill failed to show that Goga Bap's offered explanation for the reduction of her work hours was pretextual. Mr. Patel credibly testified that Ms. Hill's hours were reduced because of her poor punctuality and attendance, which required the hiring of an additional employee. Ms. Hill did not bring forward any evidence showing that Goga Bap's offered reason was a pretext for an improper purpose. Thus, Ms. Hill failed to bring forward evidence showing retaliation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order of dismissing Ms. Hill's Petition for Relief based on lack of jurisdiction because Goga Bap Corporation, does not meet the statutory definition of an employer; or in the alternative, dismiss Ms. Hill's Petition for Relief because she failed to establish her retaliation claim.

DONE AND ENTERED this 7th day of January, 2013, in
Tallahassee, Leon County, Florida.



THOMAS P. CRAPPS
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2013.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2011 version.

^{2/} Two days before the final hearing, Respondent filed a Motion to Correct Case Caption and/or Substitute Party. Specifically, Respondent argued that the proper party was Goga Bap Corporation (Goga Bap), which owned the Subway franchise where Petitioner worked, not "Subway." At the beginning of the final hearing, the undersigned heard argument on Respondent's motion and Petitioner's statement that she did not oppose the relief sought. Consequently, the undersigned ruled that the case caption be corrected to show that the proper party, Respondent, is Goga Bap Corporation, doing business as Subway Store No. 13268.

^{3/} Ms. Hill's termination is not at issue in this case. Ms. Hill filed her employment discrimination charge here on November 9, 2011, alleging retaliation of reducing her work hours based on the filing of her EEOC complaint. The Florida Human Relations Commission issued a no-cause determination on Ms. Hill's retaliation charge on March 28, 2012. The record here shows that Mr. Patel terminated Ms. Hill's employment with the Subway store on April 4, 2012. The issue in this case concerned only whether the reduction in Ms. Hill's work hours and alleged failure to provide information concerning Ms. Hill's eligibility to receive

government benefits was in retaliation for her filing the EEOC complaint on January 31, 2011. As such, the undersigned makes no findings concerning whether or not Ms. Hill's termination violated the FCRA.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.